

1 JOHN MICHAEL JENSEN, State Bar No. 176813
2 LAW OFFICES OF JOHN MICHAEL JENSEN
3 11500 West Olympic Blvd Suite 550
4 Los Angeles CA 90064
5 (310) 312-1100

6 Attorneys for Appellant Richard Lewis

7 BEFORE THE BOARD OF ADMINISTRATION
8 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
9
10

11 In the Matter of the Appeal of CalPERS'
12 Denial of Pension Benefits to Richard Lewis

11 } CALPERS CASE NO.: 2014 0256
12 } OAH CASE NO.: 2014040945

13 RICHARD LEWIS and CITY OF SAN
14 BERNARDINO,

13 } RICHARD LEWIS' NOTICE AND
14 } MOTION REGARDING
15 } JURISDICTIONAL CHALLENGE

15 Appellants.

15 } NOTICE OF DEFENSE, AFFIRMATIVE
16 } DEFENSES, AND NEW MATTER FILED
17 } CONCURRENTLY

18 **MOTION RE JURISDICTIONAL CHALLENGE**

19 CalPERS has no jurisdiction to contradict the City of San Bernardino's decisions on job
20 duties, compensation, pension benefits, and related issues. CalPERS must accept and utilize the
21 Battalion Chief's pay rate as Mr. Lewis' payrate for purposes of calculating his pension.

22 Jurisdiction Regarding Charter City Issues. CalPERS and the OAH have no jurisdiction
23 to hear or to decide any fact, testimony, document, evidence, or legal issue that contradicts the
24 charter city decision on compensation and pensions.

25 Jurisdiction Regarding Resolved Issues, Res Judicata, Collateral Estoppel. CalPERS and
26 the OAH have no jurisdiction to hear or to decide any fact, testimony, document, evidence, or
27 legal issue that contradicts the resolution of the civil service or discrimination issues. The matter
28 is subject to *res judicata*, collateral estoppel, and issue preclusion.

1 Jurisdiction Regarding Parol Evidence Issues. CalPERS and the OAH have no
2 jurisdiction to hear or to decide any fact, testimony, document, evidence, or legal issue that
3 contradicts the terms governing the Lewis-City of San Bernardino employment, including as
4 incorporated in the agreement.

5 **NO CONSENT, NO WAIVER, NO ESTOPPEL, NO VOLUNTARY APPEARANCE**

6 Mr. Lewis does not consent, does not submit, and does not agree to CalPERS' jurisdiction
7 on the issues presented here, in the Appeal (which is filed under protest), in the Notice of
8 Defense(s), and in any future pleadings.

9 Mr. Lewis does not waive his rights regarding these jurisdictional matters and issues
10 presented here and in the Notice of Defense(s) .

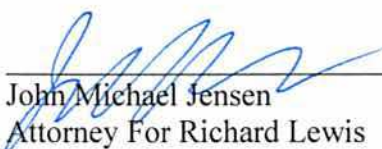
11 Mr. Lewis does not submit and does not consent to CalPERS' jurisdiction nor to its
12 consideration of the other issues as raised herein and in the Notice of Defense(s).

13 Mr. Lewis is being compelled to appear, including to protect his vested rights to the
14 higher pension and other rights.

15 Reserving all other rights, Mr. Lewis understands that CalPERS may implement and
16 utilize the compensation he received in his position as Battalion Chief from the City of San
17 Bernardino ("the City") and/or the San Bernardino Fire Department ("SBFD") for purposes of
18 calculating his CalPERS pension.

19 **Mr. Lewis has a vested right to the higher pension amount. CalPERS cannot move**
20 **to reduce the pension amount unless it litigates the matter in Superior Court under the**
21 **rules relevant to the Civil Code, Parol Evidence Rule, and charter city rights, and receives**
22 **a formal judgment in its favor. Mr. Lewis has been receiving the proper pension allowance**
23 **since his retirement on November 1, 2012. He asserts his due process right to a full hearing**
24 **before a neutral judge in the Superior Court to judgment. Before Judgment, CalPERS**
25 **cannot reduce the vested pension (including in the interim pending resolution).**

26
27 Dated: May 14, 2014

28 
John Michael Jensen
Attorney For Richard Lewis

INTRODUCTION

CalPERS' "denial of right" exceeds CalPERS' authority in this administrative hearing because:

- 1) It intrudes upon the City's charter city autonomy to determine compensation and deferred compensation and benefits;
 - 2) It violates the Parol Evidence Rule and *Code of Civil Procedure* section 1856;
 - 3) In direct contradiction to the Parol Evidence Rule, CalPERS is attempting to introduce evidence, argument and testimony that directly contradicts the terms of a fully integrated written contract of which it had notice;
 - 4) It intrudes upon and contradicts compensation, pension, "civil service" and discrimination matters resolved by the City and Mr. Lewis;
 - 5) It intrudes upon the City's authority under *Campbell v. City of Monrovia* (1978) 84 Cal.App.3d 341 to determine the nature and amount of benefits;
- 1) It seeks to retroactively apply legal authority which was adopted *after* Mr. Lewis vested in his pension rights; and
 - 2) It contains prejudicial and irrelevant allegations which have no bearing on CalPERS' calculation of Mr. Lewis' pension and are simply designed to paint Mr. Lewis and his claim in a negative light.

FACTUAL BACKGROUND

CalPERS has limited jurisdiction to calculate Mr. Lewis' pension based only on the compensation that the City paid and reported.

LAW AND ARGUMENT

I. Administrative Agency Exercises Its Authority Pursuant to Law

An administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief – including certain types of monetary relief – as long as such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes. (*Village Trailer Park, Inc. v.*

1 *Santa Monica Rent Control Bd.* (2002) 101 Cal.App.4th 1133, as modified, (Sept. 24, 2002); 2
2 Cal.Jur.3d, *Administrative Law*, §360.)

3 **II. Effect of CalPERS' Lack of Jurisdiction**

4 Administrative action that is not authorized by, or is inconsistent with, acts of the
5 legislature is void. (*Schneider v. California Coastal Com.* (2006) 140 Cal.App.4th 1339; *Kaiser*
6 *Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018.)

7 **III. Charter City Rights – CalPERS Violates the City's Charter City Autonomy When It**
8 **Challenges the City's Governance and Compensation of Mr. Lewis**

9 **A. Introduction**

10 "Charter cities¹ are specifically authorized by the state Constitution to govern themselves,
11 free of state legislative intrusion, as to those matters deemed municipal affairs. It was originally
12 "enacted upon the principle that the municipality itself knew better what it wanted and needed
13 than the state at large, and to give that municipality the exclusive privilege and right to enact
14 direct legislation which would carry out and satisfy its wants and needs." (*Fragley v. Phelan*
15 (1899) 126 Cal. 383, 387, 58 P. 923 (lead opn. by Garoutte, J.)) The provision represents an
16 "affirmative constitutional grant to charter cities of 'all powers appropriate for a municipality to
17 possess ..' and [includes] the important corollary that 'so far as "municipal affairs" are concerned,
18 charter cities are 'supreme and beyond the reach of legislative enactment.' " (*California Fed.*
19 *Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 ("Cal Fed"), quoting *Ex*
20 *Parte Braun* (1903) 141 Cal. 204, 207; *City of Vista, supra.*)

21 **B. City of San Bernardino**

22 The City of San Bernardino is a charter city organized under the California Constitution,
23 art. XI, §§ 3(a), 5(a) and (b). Art XI sec 5.

24 Accepting a broad grant of autonomy available under the Constitution, the City² has the

25 _____
26 ¹ "There are 120 charter cities in the state of California. SBCTC states in its brief that
27 more than half the state's population live in charter cities." (*State Bldg. and Const. Trades*
28 *Council of Cal. v. City of Vista* (2012) 54 Cal.4th 547 ("*City of Vista*").)

² The *Government Code* classifies cities as either "general law cities" (cities organized
under the general law of California) or "chartered cities" (cities organized under a charter).

1 power and authority provided by the State Constitution's grant of plenary authority to charter
2 cities, including to determine their employees' compensation and how to structure its internal
3 governance and offices. (*Cal. Const.*, art. XI, §§ 3(a), 5(a); *City of Marysville v. Boyd* (1960) 181
4 Cal.App.2d 755, 756-757).

5 The City may make and enforce ordinances and regulations in respect to municipal
6 affairs, subject only to restrictions and limitations provided in the charter. With regard to
7 municipal affairs, the California Constitution provides that city charters adopted pursuant to the
8 Constitution supersede all inconsistent laws. (*Cal. Const.*, art. XI, §5(a).) Charter cities'
9 ordinances relating to matters which are purely municipal affairs prevail over state laws on the
10 same subject. (*Pack v. Superior Court* (2011) 199 Cal.App.4th 1070.)

11 C. Constitutional "Home Rule" Autonomy of Charter Cities to Set
12 Compensation of City Employees

13 The California Constitution clearly enumerates compensation is a "municipal issue" that
14 is not a state-wide concern.

15 The state constitution grants charter cities specific authority over the
16 "..Constitution, regulation and government of..sub government in all or part of a
17 city.." including plenary power to determine "..the manner in which, the method
18 by which, the times at which, and the terms for which the.. .municipal officers and
19 employees. .shall be elected or appointed, and for their removal, and..
20 **compensation.**" (*Cal. Const.*, art. XI, § 5(a)(b).)³

21 [Citations.] ... [A] general law city ... must comply with state statutes that specify requirements
22 for entering into contracts. [Citations.]' (*City of Orange v. San Diego County Employees*
Retirement Assn. (2002) 103 Cal.App.4th 45, 52; see also *City of Vista, supra.*)

23 ³ *Cal. Const.*, art. XI, §5(b). "It shall be competent in all city charters to provide, in
24 addition to those provisions allowable by this Constitution, and by the laws of the State for: (1)
25 the constitution, regulation, and government of the city police force (2) subgovernment in all or
26 part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject
27 only to the restrictions of this article, to provide therein or by amendment thereto, the manner in
28 which, the method by which, the times at which, and the terms for which the several municipal
officers and employees whose compensation is paid by the city shall be elected or appointed, and
for their removal, and for their compensation, and for the number of deputies, clerks and other
employees that each shall have, and for the compensation, method of appointment,
qualifications, tenure of office and removal of such deputies, clerks and other employees."

1 Recent Supreme Court decisions recognize charter cities' powers and autonomy with
2 respect to the compensation of its employees.

3 Most prominently, [the Supreme Court has] limited or invalidated state laws that
4 unduly interfere with the prerogative of local governments to set the salaries⁴ of
5 their own employees. (See *County of Riverside v. Superior Court* (2003) 30
6 Cal.4th 278, 132 Cal.Rptr.2d 713, 66 P.3d 718; *San Francisco Labor Council v.*
7 *Regents of the University of California* (1980) 26 Cal.3d 785, 163 Cal.Rptr. 460,
8 608 P.2d 277; *Sonoma County Organization of Public Employees v. County of*
9 *Sonoma* (1979) 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (*County of*
10 *Sonoma*.)
11 (*City of Vista, supra.*)

12 In light of this constitutional provision, the city may determine the ... compensation level
13 of the "city police [and fire] force" as well as those city employees involved in the
14 "subgovernment in all or part of a city" . *Cal. Const.*, art. XI, §5, subd. (b), italics added; see
15 *Bishop v. City of San Jose, supra*, 1 Cal.3d 56, 81 Cal.Rptr. 465, 460 P.2d . (See *City of Vista,*
16 *supra.*)

17 Clearly, Mr. Lewis is a city employee who is necessary to maintain the "subgovernment
18 in all or part of a city" (Cal. Const., art. XI, § 5, subd. (b), item (2)), and/or considered "deputies,
19 clerks and other employees" of the city (*id.*, item (4)). (*City of Vista.*) Mr. Lewis' compensation is
20 a municipal affair beyond CalPERS' regulation. CalPERS must accept the amount of the "pay
21 rate" clearly designated by the City, including the Battalion Chief position.

22 **D. Pensions That Flow From Compensation Are Also a Local Issue Autonomous**
23 **to Charter Cities**

24 The recent Supreme Court decision in *City of Vista* also clearly recognize that the pension
25 calculations that flow from the autonomous compensation decisions are also likewise local
26 municipal issues that the state cannot regulate.
27

28 ⁴ In *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, the California
Supreme Court upheld the city's salary schedules ... Taxpayer's allegations that the salary
schedule differed from one recommended by the civil services commission failed to cause the
court to order the civil service schedule because the taxpayer failed to "meet the heavy burden"
of persuasion required of those challenging a Charter city decision pursuant to *Boyd*." (*Id.* at p.
921.)

1 Interference with employee salaries would thus have an enormous, ongoing
2 impact on city finances. And if the state sought to control the salaries of only
3 some city employees, such control would interfere with the city's ability to set
4 salary schedules and pay differentials for its employees, decisions which in turn
5 affect matters of employee morale, retention, and workforce cohesion that indeed
6 go to the heart of municipal autonomy. **Interference with employee salaries
7 would also likely affect a municipality's long-term pension obligations.**
8 (*City of Vista, supra.*, emphasis added.)

9 **E. CalPERS' Violation of the City's Constitutional Autonomy on the Right to**
10 **Compensate**

11 The City paid Mr. Lewis the salary of Battalion Chief. CalPERS' efforts to reject Mr.
12 Lewis' higher compensation interferes with the City's protected municipal autonomy.

13 CalPERS may argue that CalPERS is not preventing the City from paying what it wants,
14 that it is only applying the PERL to determine how much of the compensation will increase the
15 pension allowance under the PERL. However, that distinction is without merit.

16 The charter city hired or renewed the employment of the employee at the specified
17 compensation with the clear intent of the employer and the employee to increase Lewis'
18 CalPERS pension. The charter city is establishing compensation and pension under its "home
19 rule" authority that necessarily binds CalPERS to the amount of the compensation and pension.

20 Pension benefits are a "manner" or form of deferred compensation that is protected by the
21 charter city right to autonomy in the Constitution.

22 The pension rights are incorporated in the employment agreement at the start of
23 employment. CalPERS does not have a legitimate right to interfere with the compensation
24 decision of charter cities because it wants a state-wide rule on how much compensation is
25 allowable. The Supreme Court has already determined that compensation and pensions are
26 municipal matters. CalPERS' laws and decisions that vary from the charter city's decision on
27 compensation made under the local charter violate the charter city "home rule" autonomy.
28 CalPERS must accommodate or revise its definitions to implement the decisions and practices of
the charter city that it contracts with. CalPERS cannot impose its state-wide compensation
practices on the City, even for purposes of calculating a pension. To do so violates the charter
cities' home rule autonomy.

1 CalPERS may argue that typically the charter city's compensation decision increase the
2 pension obligations of the city. If the payroll increase, then CalPERS increases the contributions
3 required, as a part of its actuarial duty, and passes those costs onto the employing city. The
4 charter city's overall compensation that a city offers may increase or decrease the pension
5 obligations as determined in the actuarial valuation as performed by CalPERS , but the city
6 remains responsible for bearing the pension and compensation obligation and costs.

7 By attempting to limit the compensation that a charter city offers in the realm of
8 determining pension benefits, CalPERS invades the City's local prerogative expressly granted
9 and protected by constitutional text. CalPERS' use of the PERL in this case excessively interferes
10 with municipal autonomy that is expressly prevented by *City of Vista*.

11 **F. Employers Establish the Rights and Amount of Compensation, Contract**
12 **Issues**

13 Employees' rights to benefits and compensation *arise solely out of* and are determined by
14 reference to *local laws, rules and regulations*. (*Batters v. City of Santa Monica* (1980) 101
15 Cal.App.3d 595, 605.) In *Batters*, the court determined that local entities establish the amount of
16 benefits payable and all but overturned *Marsille v. City of Santa Ana* (1976) 64 Cal.App.3d 764
17 and its progeny:

18 [We rule that] employees' rights could "only be properly understood by reference
19 to the rules and regulations established by the member's employer which define
20 the member's rights.... [T]hese rights arise solely out of and are determined by
reference to *local laws, rules and regulations*." (Italics in original.)

21 *Batters v. City of Santa Monica, supra*, at 605.

22 In other words, the PERL does not preempt the charter city's local decisions establishing
23 the entitlement to and amount of employment benefits, including compensation, pay rate, or
24 pension. There is no conflict and no preemption by the PERL.

25 CalPERS cannot interfere in the compensation decisions made by the charter city.
26 CalPERS cannot reject the decisions. *Marsille* and *City of Los Altos v. Board* (1978) 80
27 Cal.App.3d 1049 are no longer good authority that CalPERS or the PERL preempt local decision
28 making.

1 The rationale of *Marsille* appears to be that *entitlement* to [benefits] is *established*
2 by reference to state, rather than local, law and in this we find it
3 unacceptable...[L]ocal authorities acting for a contracting agency are free (within
4 the constraints of negotiation with their contracting members where unions or
5 associations are involved) to determine *entitlement* to [benefits]."
(*Campbell v. City of Monrovia, supra*, at 348.)

6 **G. CalPERS' Other Compensation Rules Also Violate Home Rule Autonomy**

7 CalPERS essentially argues that the City cannot pay Mr. Lewis a salary in the Battalion
8 Chief position that qualifies as "pay rate" for final compensation purposes if Mr. Lewis did not
9 perform the duties of the Battalion Chief position.

10 No law forbids the practice of paying an individual in a position to which he is entitled
11 but does not perform the duties. In fact, the practice is wide spread and accepted. For example, in
12 *Labor Code* section 4850 and other statutes and cases, the practice of paying a person in the
13 position without respect to whether the individual is performing the duties of the position is
14 accepted even under the PERL and for purposes of calculating a higher pension. No law prevents
15 the City's use of payments to Mr. Lewis in the Battalion Chief position for purposes of paying a
16 pension based on that rate.

17 CalPERS is without even statutory support to deny a pension based on the performance
18 or non-performance of job duties. For example, CalPERS' seeking to determine the job duties
19 invade the City's constitutional "home rule" autonomy, including as the City has already
20 determined the job duties and related pay rate (as Battalion Chief) .

21 **H. Reasonableness of Amount of Compensation**

22 Courts will not question the terms or reasonableness of compensation. California courts
23 are reluctant to intervene in issues involving compensation for municipal officers and employees.
24 see (*Merritt v. Weldon* (1908) 154 Cal. 545, et al.)

25 **I. No State Wide Interest in Regulating Compensation**

26 The issue of public employee wages and terms of compensation are matters of local, not
27 statewide, concern. (*In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, review denied.)

28 "In this case, we conclude that no statewide concern has been presented justifying the
state's regulation of the wages that charter cities require their contractors to pay to workers hired

1 to construct locally funded public works. In light of our conclusion that there is no statewide
2 concern here, we need not determine whether the state's prevailing wage law is "reasonably
3 related to .. resolution" of that concern (*California Fed. Savings, supra*, 54 Cal.3d at p. 17, 283
4 Cal.Rptr. 569, 812 P.2d 916) and is "narrowly tailored" to avoid unnecessary interference in
5 local governance (*id.* at p. 24, 283 Cal.Rptr. 569, 812 P.2d 916)." (*City of Vista, supra.*)

6 **J. Pensions and the Amount of Pensions Are Municipal Issue**

7 Providing for pensions is also a municipal issue. A charter city's constitutional grant of
8 autonomy reserves to the city to designate the terms of the compensation that are utilized by
9 CalPERS. (*Murphy v. City of Piedmont* (1936) 17 Cal.App.2d 569; *Richards v. Wheeler* (1935)
10 10 Cal.App.2d 108.) Questions arising in connection with retirement are also municipal issues.
11 (*Heard v. Board of Administration of All City Employees' Retirement System of City of Los*
12 *Angeles* (1940) 39 Cal.App.2d 685.)

13 **Interference with employee salaries would also likely affect a municipality's**
14 **long-term pension obligations.** (Emphasis added). (*City of Vista, supra.*)

15 **IV. No Jurisdiction to Intrude on Charter City Determinations**

16 CalPERS is without jurisdiction to supplant the charter city's decision on job duties and
17 compensation for pension purposes.

18 **V. Civil Service and Discrimination Dispute, Res Judicata and Collateral Estoppel**

19 CalPERS is largely seeking to re-litigate a dispute that it was already aware of and privity
20 to as administrator of the City's pension benefits. CalPERS is seeking to re-litigate and to assert
21 jurisdiction over a civil service and discrimination dispute that it previously accepted. Now, after
22 the fact, CalPERS tries to deny Mr. Lewis the benefits of the resolution of the dispute between
23 the parties that CalPERS previously approved.

24 In the quasi-judicial process, CalPERS received information from the City and Mr. Lewis
25 about the nature of the dispute and its resolution. Through its "compensation review unit",
26 CalPERS explicitly weighed evidence and made determinations of law. Although a formal
27 Administrative Procedures Act ("APA", *Government Code*, §§11340, *et seq.*) hearing was
28 available to CalPERS, CalPERS chose not to make an adversarial record. Under the case law of

1 *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464 and *res judicata* concepts,
2 CalPERS was required to bring forward all legal causes of action that arose from the same
3 nucleus of common facts at that time. Now years later, CalPERS is trying to re-litigate a "second
4 process" on these same issues. No exception to collateral estoppel/*res judicata* applies.

5 The U.S. Supreme Court held: "When an administrative agency is acting in a judicial
6 capacity and resolves disputed issues of fact properly before it which the parties have had an
7 adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce
8 repose". (*United States v. Utah Construction & Mining Company* (1966) 384 U.S. 394.) A final
9 administrative decision binds the parties on the issues contested. (*Miller v. City of Los Angeles*
10 (2008) 169 Cal.App.4th 1373.)

11 The litigation of issues that could and should have been pursued in a prior proceeding
12 action is also barred. (*Takahashi v. Board of Education, supra.*) Unreviewed findings of a state
13 administrative agency are entitled to preclusive effect. (*Brand v. Regents of Univ. of California*
14 (2008) 159 Cal.App.4th 1349.) An administrative adjudicatory decision which has not been
15 overturned through the courts is absolutely immune from collateral attack. (*Bank of America Nat.*
16 *Trust & Savings Ass'n v. Mundo* (1951) 37 Cal.2d 1.) CalPERS acts in excess of jurisdiction
17 when it seeks to hold a second hearing. (*Code of Civil Procedure*, §1085.)

18 **VI. CalPERS Violates the Parol Evidence Rule**

19 The "Parol Evidence Rule" ("PER") bars *extrinsic evidence* (oral or written) of prior or
20 contemporaneous agreements to *add to or modify* the terms of an unambiguous "integrated"
21 written instrument. (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225; *Los Angeles Unified School*
22 *Dist. v. Great American Ins. Co.* (2008) 163 Cal.App.4th 944, 957; *Pacific State Bank v. Greene*
23 (2003) 110 Cal.App.4th 375, 379; *Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-G.*)

24 "Terms set forth in a writing *intended* by the parties as a *final expression* of their
25 agreement with respect to such terms as are included therein *may not be contradicted* by
26 evidence of any prior agreement or of a contemporaneous oral agreement." (*Code of Civil*
27 *Procedure*, § 1856(a) (emphasis added); see also *Commercial Code*, § 2202, applicable to
28 commercial transactions; *Hayter Trucking, Inc. v. Shell Western E & P, Inc.* (1993) 18

1 Cal.App.4th 1, 13-14; *Los Angeles Unified School Dist. v. Great American Ins. Co.*, *supra*, at
2 957; *Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-G.*)

3 Even though the PER "results in the exclusion of evidence, it is *not* a rule of evidence *but*
4 *is one of substantive law.*" (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 (emphasis
5 in original; internal quotes omitted); *Tahoe Nat'l Bank v. Phillips* (1971) 4 Cal.3d 11, 22-23;
6 *BMW of No. America, Inc. v. New Motor Veh. Bd.* (1984) 162 Cal.App.3d 980, 990; *Cal. Prac.*
7 *Guide Civ. Trials & Ev. Ch. 8E-G.*)

8 **A. PER Affects Relevancy**

9 Because parol evidence cannot alter or vary the terms of an integrated writing, evidence
10 of prior or collateral oral agreements is *legally irrelevant.* (*Tahoe Nat'l Bank v. Phillips, supra*, at
11 23; *Casa Herrera, Inc. v. Beydoun, supra*, at 344; *BMW of No. America, Inc. v. New Motor Veh.*
12 *Bd., supra*, at 990; *Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-G.*)

13 **B. PER Is Applicable to CalPERS as Third Party⁵**

14 The PER applies in litigation involving *third parties* in the same manner it applies in
15 actions between the parties to the instrument. (*Kern County Water Agency v. Belridge Water*
16 *Storage Dist.* (1993) 18 Cal.App.4th 77, 86; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th
17 337, 349-350, fn. 8 – third party claimed to be beneficiary of release of "all parties".)

18 **C. Mr. Lewis and the City Intended To Be Exclusive Pension Term**

19 "Writings" clearly covers *written contracts* between parties (including commercial
20 instruments). (*Code of Civil Procedure*, § 1856(h); *Commercial Code*, § 2202; *Enea v. Coldwell*
21 *Banker/Del Monte Realty* (1998, ND California) 225 B.R. 715.) Clearly, the Lewis-City of San
22 Bernardino employment contract is a fully integrated "writing" containing a merger clause. If the
23 writing is an integration (i.e., intended as "final expression" of the parties' agreement), extrinsic
24 evidence is inadmissible to contradict its terms. (*Code of Civil Procedure*, § 1856(a); *Hayter*

25 _____
26 ⁵ The result was otherwise before 1979, when the PER did not apply in an action between
27 a contracting party and a stranger to the contract. However, this limitation was abolished by a
28 1978 amendment to CCP § 1856 that deleted language expressly limiting the rule to disputes
"between parties and their representatives." (*Kern County Water Agency v. Belridge Water*
Storage Dist., supra, at 86; *Neverkovec v. Fredericks, supra*, at 349-350, fn. 8.)

1 *Trucking, Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15; *City of Manhattan*
2 *Beach v. Sup.Ct. (Farquhar)* (1996) 13 Cal.4th 232, 238.) A writing is "completely integrated" if
3 it was *intended* by the parties to serve as the *final, complete and exclusive* expression of their
4 agreement. (See *Code of Civil Procedure*, § 1856(a),(d); and *Masterson v. Sine* (1968) 68 Cal.2d
5 222, 225.)

6 It is undisputed that Mr. Lewis and the City *intended* the agreement to be the final,
7 complete, and *exclusive* expression of the terms of their agreement ("complete integration").
8 (*Code of Civil Procedure*, § 1856(d); see *Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d
9 139, 146.) Once it is found that the parties intended the writing to be the "final expression" of
10 their agreement (i.e., an integration), contrary expressions of intent and evidence are excluded. A
11 party is not permitted to escape its obligations "by showing he did not intend to do what his
12 words bound him to do." (*Brant v. California Dairies* (1935) 4 Cal.2d 128, 134.)

13 **D. Effect of Integration Clause**

14 An integration clause is an express statement that all prior discussions are superseded by
15 (or "merged" into) the written agreement. The presence of such an integration clause is given
16 *great weight* on the issue of integration. It is "very persuasive, if not controlling, on the issue."
17 (*Masterson v. Sine, supra*, at 225; *Banco Do Brasil, S.A. v. Latian, Inc., supra*, at 1002-1003;
18 *Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-G.*)

19 **E. What Constitutes "Contradictory" Evidence**

20 The statutory scheme prohibits the introduction of extrinsic evidence that *alters, varies or*
21 *adds to* or directly contradicts an integrated writing. (*Code of Civil Procedure*, § 1856(a),
22 Comment; see *Masterson v. Sine, supra*, at 225; *Alling v. Universal Mfg. Corp.* (1992) 5
23 Cal.App.4th 1412, 1436.)

24 CalPERS is asserting terms to directly contradict the terms of the agreement. Clearly,
25 CalPERS is trying to replace the amount of the salary with a different amount that is *inconsistent*
26 with the writing. No *exceptions* to the PER apply. (See *Gerdlund v. Electric Dispensers Int'l*
27 (1987) 190 Cal.App.3d 263, 270; *Banco Do Brasil, S.A. v. Latian, Inc., supra*, at 1001.)

28 No statute authorizes CalPERS to avoid the PER. CalPERS makes no attempt to justify

1 its avoidance of the PER. CalPERS simply disregards the existing term.

2 **VII. CalPERS May Not Use Law Not in Effect and Apply It Retroactively to Mr. Lewis**

3 A statute shall not be given retroactive effect unless such construction is required by
4 explicit language or by necessary implication. (*Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422
5 (U.S. 2006).) Under California law, statutes are not to be given a retrospective operation unless it
6 is clearly made to appear that such was the legislative intent. (*Gadda v. State Bar of Cal.*, 511
7 F.3d 933 (9th Cir. 2007). *58 Cal. Jur. 3d Statutes § 32.*)

8 Generally statutes have prospective effect, and there is a presumption against the
9 retroactive application of statutes. The presumption is rooted in constitutional principles, such as
10 the due process clause and prohibitions against ex post facto laws, and consistent with a general
11 rule of construction applicable to codes and other statutes alike that, unless the intention to make
12 it retrospective clearly appears from the act itself, a statute will not be construed to have that
13 effect. The presumption is also based on the rationale that retroactive laws are characterized by a
14 want of notice and a lack of knowledge of past conditions, and they disturb feelings of security in
15 past transactions, that notice of a rule should be given in advance of the actions to be judged. The
16 presumption of prospectivity assures that reasonable reliance on current legal principles will not
17 be defeated in the absence of a clear indication of a legislative intent to override such reliance.
18 (*58 Cal. Jur. 3d Statutes § 32.*)

19 CalPERS is trying to retroactively bind Mr. Lewis with rules and regulations that did not
20 yet have the force and effect of law at the time he vested in his pension rights.

21 **VIII. Attorney Fees, Private Attorney General, Public Right to Make CalPERS Respect**
22 **the PER, Government Code Section 800; CalPERS' Violation of the PER is**
23 **Arbitrary and Capricious; Request for Attorney's Fees**

24 In any civil action to appeal or review the award, finding, or other determination of any
25 administrative proceeding under any provision of state law, except actions resulting from actions
26 of the California Victim Compensation and Government Claims Board, where it is shown that
27 the award, finding, or other determination of the proceeding was the result of arbitrary or
28 capricious action or conduct by a public entity or an officer thereof in his or her official capacity,

1 a complainant who prevails in the civil action and is personally obligated to pay attorney's fees
2 may collect reasonable attorney's fees, computed as prescribed, from the public entity, in
3 addition to any other relief granted or other costs awarded. (*2A Cal. Jur. 3d Administrative Law*
4 *§ 706; Government Code, § 800, subd. (a); Code of Civil Procedure, § 1021.5.*)

5 **A. Attorney Fees Under Private Attorney General, Code of Civil Procedure**
6 **Section 1021.5**

7 Mr. Lewis is vindicating the public's right to immediate payments of undisputed amounts,
8 the prohibition against the government ignoring charter city constitutionally protected rights,
9 prohibition against applying law retroactively, the Parol Evidence Rule, and compelling
10 CalPERS to recognize its limited jurisdiction.

11 A court may award attorney fees, upon motion, to a successful party against one or more
12 opposing parties in any action which has resulted in the enforcement of an important right
13 affecting the public interest if:

- 14 • A significant benefit, whether pecuniary or nonpecuniary, has been conferred on the
15 general public or a large class of persons;
- 16 • The necessity and financial burden of private enforcement, or of enforcement by one
17 public entity against another public entity, are such as to make the award appropriate;
- 18 • Such fees should not in the interest of justice be paid out of the recovery, if any.

19 With respect to actions involving public entities, this provision applies to allowances
20 against, but not in favor of, public entities, and no claim will be required to be filed therefor,
21 unless one or more successful parties and one or more opposing parties are public entities, in
22 which case no claim will be required to be filed. (*16 Cal. Jur. 3d Costs § 121.*)

23 The benefits and cost of the claimant's legal effort transcends Mr. Lewis's mere personal
24 interest.

25 **B. Attorney Fees Under Government Code 800: CalPERS' Arbitrary and**
26 **Capricious Behavior, Denial of Parol Evidence Rule, Denial of Undisputed**
27 **Amounts**

28 Arbitrary or capricious conduct encompasses conduct not supported by a fair or

1 substantial reason, a stubborn insistence on following unauthorized conduct, or a bad faith legal
2 dispute; attorney's fees cannot be awarded simply because the administrative entity or official's
3 action was erroneous, even if it was clearly erroneous. (*2A Cal. Jur. 3d Administrative Law* §
4 707.)

5 An award of attorney's fees is proper where the agency relies on a patently invalid
6 regulation. (*Verdugo Hills Hospital, Inc. v. Department of Health* (1979) 88 Cal.App.3d 957.)

7 With regard to the statute allowing an award of attorney fees based on a public
8 entity's actions that were wholly arbitrary or capricious, the phrase "arbitrary or
9 capricious" encompasses conduct not supported by a fair or substantial reason, a
10 stubborn insistence on following unauthorized conduct, or a bad faith legal
11 dispute. (*Government Code*, § 800; *Zuehlsdorf v. Simi Valley Unified School*
Dist., 148 Cal. App. 4th 249, 55 Cal. Rptr. 3d 467 (2d Dist. 2007).)
2A Cal. Jur. 3d Administrative Law § 707.)

12 Failure to pay Mr. Lewis can also be seen as lack of good faith, breaching its fiduciary
13 duties, prejudicing Mr. Lewis by unfairly denying him the financial wherewithal to mount a solid
14 legal defense, etc. Mr. Lewis seeks fees under *Code of Civil Procedure* section 1251.5 and
15 *Government Code* section 800.

16 **No Consent, No Waiver, No Estoppel, No Voluntary Appearance**

17 Mr. Lewis does not consent, does not submit, and does not agree to CalPERS' jurisdiction
18 on the issues presented here, in the Appeal (filed under protest), in the Notice of Defense(s), and
19 in any future pleadings.

20 Mr. Lewis does not waive his rights regarding these jurisdictional matters and issues
21 presented here and in the Notice of Defense(s) .

22 Mr. Lewis does not consent to CalPERS' jurisdiction nor to its consideration of the other
23 issues as raised herein and in the Notice of Defense(s).

24 Mr. Lewis is being compelled to appear, including to protect his vested rights to the
25 higher pension and other rights.

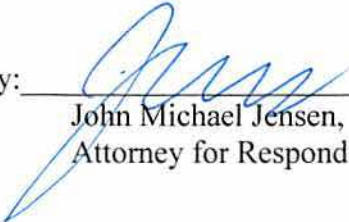
26 Reserving all other rights, Mr. Lewis understands that CalPERS may consider the
27 compensation he received from San Bernardino after he became a full-time employee for
28 purposes of calculating his CalPERS pension.

CONCLUSION

1
2 Charter cities have the right to determine compensation for pension purposes. The PERL
3 does not preempt the charter cities' autonomous decisions on compensation and office structure.
4 The contract between CalPERS and the charter city does not delegate, transfer, waive, or
5 abdicate control or give CalPERS the right to revise the charter city determination. CalPERS
6 must accept and use the compensation decisions made by the contracting charter cities when
7 calculating the pension benefits of the charter employees.

8 Respectfully submitted.

9
10 Dated: May 14, 2014

11 By:  _____
12 John Michael Jensen,
13 Attorney for Respondent Richard Lewis
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Law Offices of John Michael Jensen, 11500 W. Olympic Blvd., Suite 550, Los Angeles, CA 90064-1524.

On May 14, 2014, I served the following document(s) by the method indicated below:

RICHARD LEWIS' NOTICE AND MOTION REGARDING JURISDICTIONAL CHALLENGE

By placing the document(s) listed above in a sealed envelope(s) and consigning it First class mail through the U.S. Postal Service to the address (es) set forth below.

Wesley E. Kennedy
Senior Staff Counsel
CalPERS Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 14, 2014, at Los Angeles, California.



Griselda Montes De Oca